HEMIS INTERCO BV SDN. BHD. v. SYARIKAT PEMBENAAN HASHBUDIN (M) SDN. BHD.

[O.C.J. (George J.) April 8, 1985]

[Kuala Lumpur – Suit No. C 3582 of 1984]

Contract – Contract of guarantee – Guarantee given by Insurance company for due peformance by sub-contractor – Guarantee not signed by the other party – Main contractor can demand guarantee money if sub-contractor fails to execute.

In this case the defendants were one of the main contractors in the Penang Bridge project. The plaintiffs were one of the sub-contractors engaged by the defendants. Universal Life General Insurance Sdn. Bhd. gave a performance guarantee to the defendants regarding the work of the plaintiffs. Subsequently the defendants repudiated the contract with the plaintiffs. The plaintiffs then caused a writ to issue and obtained *ex parte* an interlocutory injunction restraining the defendants from seeking payment from the guarantor (insurance company) under the performance bond. The plaintiffs also contested the validity of the guarantee bond on the ground that it was not signed by the defendants and it was also wanting in particulars and as such was defective and invalid. The plaintiffs also alleged that it was wrongful repudiation of the contract by the defendants that had resulted in the non-performance of the contract by the plaintiff.

Held: (1) plaintiff cannot challenge the validity of the guarantee bond. Its validity is a matter between the main contractor and the insurance company;

(2) the insurance company will have to pay out the amount guaranteed unless as provided in the agreement the subcontractor was relieved from performance by any clause of the contract or by statute or decision of a tribunal which is not the case here;

(3) if the main contractor acted unreasonably or was responsible for forcing the sub-contractor not to perform, the subcontractor's remedy is to sue the main contractor for damages which he has already done.

Cases referred to:

(1) *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd.* [1978] 1 Q.B. 159.

(2) *R.D. Harbottle* v. *National Westminster Bank* [1977] 2 All E.R. 862.

CIVIL SUIT.

Manjit Singh for the defendant/applicant.
David Lingam for the plaintiff/respondent.

Cur. Adv. Vult.

George J. : Syarikat Pembenaan Hashbudin (M) Sdn. Bhd. (main contractor) is one of the main contractors in the Penang Bridge project. It subcontracted certain aspects of its share of the works to Hemis Interco BV Sdn. Bhd. (subcontractor). The subcontractor was required to provide the main contractor with a performance bond to the value of 5% of the contract sum which requirement the subcontractor purported to meet by providing the main contractor with a document entitled "Insurance Guarantee No. 00033009153" issued by an insurance company called Universal Life & General Insurance Sdn. Bhd. (insurance company). This document contained the terms of an agreement the parties to which are stated to be the insurance company and the main contractor but it seems that it was only executed by the insurance company. The space in the agreement for the signature of the main contractor was left blank.

The agreement provides *inter alia* that the insurance company would on demand pay to the main contractor the amount guaranteed in the event the subcontractor "shall in any respect fail to execute the contract . . . notwithstanding any contestation or protest by the subcontractor . . ." The payment has to made "unless the subcontractor was relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal . . ."

According to the subcontractor, the main contractor purported to repudiate the agreement between it and the subcontractor allegedly for failure on the part of the subcontractor to perform. The subcontractor while admitting the failure to perform says that it was prevented from doing so by the main contractor. It caused a writ to issue against the main contractor suing *inter alia* for damages said to arise from the "wrongful repudiation" of the contract as well as for a declaration that the main contractor is not entitled to demand from the insurance company payment under the performance bond and for an injunction restraining the main contractor from doing so.

Having caused the writ to issue the subcontractor plaintiff by an *ex parte* application sought and obtained an interlocutory injunction restraining the main contractor defendant from seeking payment under the performance bond.

The subcontractor plaintiff had relied firstly on its contention that the insurance guarantee was not executed by or on behalf of the main contractor and that in any event it was grossly wanting in particulars and that, as such, was defective and invalid.

The other ground that the subcontractor had relied on in seeking the *ex parte* injunction was the

contention that it was the wrongful repudiation of the contract by the main contractor that had resulted in the non-performance of the contract by the subcontractor.

The subcontractor had also contended that if, the insurance company in response to the demand made on it by the main contractor made the payment of the 5% of the contract sum prior to the disposal of the action, "irreparable damage and loss may be occasioned to the plaintiff and its directors in their personal capacities which cannot be readily compensated for in damages".

In my judgment, the subcontractor, having admittedly delivered the "insurance guarantee agreement" to the main contractor in purported compliance with the contractual requirement to provide the required performance bond, cannot be heard to challenge its validity. In any event the issue of its validity seems to me to be a matter between the alleged parties to the agreement, namely, the main contractor and the insurance company.

As has been seen, as between the main contractor and the insurance company, if in fact there was a valid guarantee of due performance, then on demand the insurance company would have to pay out the amount guaranteed "unless the subcontractor was relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal . . .". It is common ground that the subcontractor was not relieved by any statute or the decision of a tribunal. What then is left is relief from performance by a clause of the contract. I pause to observe that this is not synonymous with "relief from performance by the breach of a clause of the contract". My attention has not been drawn to any clause in the contract that *per se* relieves the subcontractor from performance. The subcontractor in fact does not rely on any such clause. Its cause of action is stated to be the unreasonable repudiation of the contract. The alternative cause is stated to be the breach of clause 4(i) of the contract. It might very well be that the main contractor was in breach of the contract and had acted unreasonably or was responsible for forcing the subcontractor not to perform. But on the principles laid down in *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd* [1] and also in *R.D Harbottle* v. *National Westminster Bank*,[2] the guarantor cannot be prevented from paying out the money demanded. In my judgment, it follows that neither can the main contractor be restrained from recovering the money. In providing the performance bond, it will have to be assumed that the subcontractor was aware that the insurance company or guarantor would have to pay out even in the face of any "contestation or protest" by the subcontractor. The subcontractor's remedy is to sue the main contractor for damages as it has in fact done. In the meantime the main contractor cannot be stopped from seeking to be paid pursuant to the performance bond. If the plaintiff succeeds in its action, that the defendant had drawn on the performance bond, can and will no doubt be taken into account by the Court in assessing damages.

The interim injunction granted to the plaintiff on February 15, 1985 (see the Order, enclosure (9)) is dissolved. The Senior Assistant Registrar of the Court shall upon application therefor inquire into and assess the damages (if any) suffered by the defendant as a result of the said interim injunction having been granted and the plaintiff shall pay to the defendant such damages and the costs of and incidental to such inquiry and assessment as well as the costs of an incidental to this motion.

Order accordingly.

Solicitors : *Sri Ram, Zulkifly & Kumar; David Lingam & Co.*

BORHANUDDIN BIN HAJI JANTARA & ORS. v. AMERICAN INTERNATIONAL ASSURANCE CO. LTD.

[O.C.J. (George J.) June 4, 1985]

[Kuala Lumpur – Civil Suit No. 2785 of 1978]

Insurance – Life insurance premium paid on December 2 – Proposal contained stipulation insurance not to be effective till policy issued – Receipt also laid down that it did not amount to acceptance – Payer died on December 4 – Insurance company not liable.

Contract – Payment of insurance premium does not amount to acceptance of proposal – Risk to commence on issuance of policy – No concluded contract.

In this case one Azian binti Borhanuddin had completed a document entitled "Application for Life Assurance" in the insurance company (AIA). The form of proposal ended with a declaration signed by Azian which provided that 'The assurance herein applied for shall not take effect unless and until policy issued and delivered to me ..."